Supreme Court, U.S.
F I L E D
MAY 29 1997
CLERK

No. 96-1639

In The

Supreme Court of the United States

October Term, 1996

KAREN ELIZABETH DEMPSTER,

Petitioner,

v.

MUNICIPALITY OF ANCHORAGE; LEJANE FERGUSON, MUNICIPAL CLERK; WILLIAM A. GREENE, ASSISTANT MUNICIPAL ATTORNEY; AND JOHN DOE 1 AND JOHN DOE PARTIES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 29, 1997

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QUESTIONS PRESENTED

Should the United States Supreme Court accept an interlocutory appeal of a decision of a Circuit Court of Appeals denying an appeal of a District Court decision granting qualified immunity to individual defendants sued under 42 U.S.C. Section 1983?

LIST OF PARTIES

Respondents accept Petitioner's statement of the List of Parties.

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RULE CITED:

Federal Rule of Civil Procedure 54(b) 3

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Respondents accept Petitioner's statement of the Opinions Below.

JURISDICTION

Respondents accept Petitioner's statement of Jurisdiction.

STATUTES OR OTHER PROVISIONS INVOLVED

Respondents accept Petitioner's statement of Constitutional Provisions and Statutes Involved.

STATEMENT OF THE CASE

Given the present procedural posture of the case, Respondents will confine themselves to correcting the inaccuracies in Petitioner's Statement of the Case in the Petition for a Writ of Certiorari. Petitioner has made a number of statements which are unsupported by the record, untrue, or both. These statements include:

1. The claim that a member of the Anchorage Municipal Assembly running for Mayor of Anchorage determined that an upcoming citizen advisory ballot issue "would bring out a large number of voters . . . unfavorable to his candidacy" (Petition, p. 9). This claim is

sheer speculation on Petitioner's part and has no support in the record below.

2. The statement that a "tumultuous school district action" was "taken against the weight of parent testimony and compromise . . . " (Petition, pp. 9-10). This statement has no support in the record below.

3. The claim that the notice of the meeting issued on January 21, 1994 was "statutorily deficient" (Petition, p. 10 n.1) was rejected in an Alaska Superior Court decision dated October 31, 1994. This decision held that the applications for recall petitions at issue in this case did not allege a meeting for purposes of the Alaska Open Meetings Act in effect at the time of the alleged meeting. This same decision held that the applications for recall petitions were legally insufficient under Alaska law and should be rejected by the Anchorage Municipal Clerk.

4. The claim that the State and Municipal Omsbudmen and other Anchorage Assembly Members all advised citizens supporting the advisory ballot that "recall was the only avenue to register their dissatisfaction . . . " (Petition, p. 10) is completely unsupported by the record.

5. The claims that the declaratory judgment action filed by the Municipality of Anchorage "derailed the application process and killed the petition" (Petition, p. 12) is Petitioner's conclusion, not a fact established by the record.

ARGUMENT

A. Existing law does not make a District Court's grant of qualified immunity immediately appealable as a matter of right, and there is no reason to expand the small class of District Court decisions that, though short of final judgment, are immediately appealable as a matter of right to include cases in which qualified immunity has been granted.

28 U.S.C. Section 1291 gives Courts of Appeals jurisdiction over "all final decisions" of District Courts, except those for which appeal is to be had to the United States Supreme Court. *Behrens v. Pelletier,* 516 U.S. ___, 116 S.Ct. 834, 838, 133 L.Ed.2d 773, 783 (1996). The District Court's granting of a Motion for Qualified Immunity as to two individual defendants, William A. Greene and Lejane Ferguson, did not "end[ ] the litigation on the merits" and thus did not meet one prong of the normal definition of a "final decision." *See Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351, 357 (1978), quoting *Catlin v. U.S.*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911, 916 (1945). Nor has Petitioner sought or received certification of the District Court's granting of qualified immunity as a final judgment under Federal Rule of Civil Procedure 54(b) and thus cannot claim jurisdiction via that route. *See Curtiss-Wright Corp. v. General Elec. Co.,* 446 U.S. 1, 7-8, 100 S.Ct. 1460, 1464-65, 64 L.Ed.2d 1, 11 (1980).

28 U.S.C. Section 1291 does not, however, bar review of all pre-judgment orders. This Court has described a "small class" of District Court decisions that, though short of final judgment, are immediately appealable

because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated." *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783, quoting *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528, 1536 (1949).

Included in this "small class" of pre-judgment orders immediately appealable as a matter of right is a decision denying a claim of qualified immunity to the extent that the decision turns on an issue of law. *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783-84. Petitioner asks this Court to grant interlocutory review so as to expand this "small class" of immediately appealable pre-judgment orders to include a District Court's grant of a claim of qualified immunity. There are overwhelming policy reasons to make immediately appealable a District Court's rejection of a claim of qualified immunity, and such reasons do not apply to a District Court's grant of qualified immunity.

The defense of qualified immunity was designed by this Court to give government officials a right to avoid both the burdens of trial and the burdens of such pre-trial matters as discovery. *Id.* at ___, 116 S.Ct. at 839, 133 L.Ed.2d at 784-85. This Court has repeatedly expressed concern of "the general costs of subjecting officials to the risks of trial – distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed.2d

411, 425 (1985), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396, 409 (1982). Referring to discovery and other pre-trial matters, the Court has observed that "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. at 817, 102 S.Ct. at 2737-38, 73 L.Ed.2d at 410 (footnote omitted).

These considerations clearly come into play when the question is whether to allow an immediate appeal of a denial of qualified immunity. They do not arise when the question is whether to carve out a whole new exception to the final-judgment rule by allowing an immediate appeal of a grant of qualified immunity. This Court should not go down that long road, particularly on this record.

B. On the merits, the District Court was correct to grant qualified immunity to individual Defendants William A. Greene and Lejane Ferguson.

There is another reason this Court should decline to grant this Writ of Certiorari: Respondents are likely to prevail on the merits. The qualified-immunity defense shields government agents from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Behrens v. Pelletier*, 516 U.S. at ___, 116 S.Ct. at 838, 133 L.Ed.2d at 783. It is telling that even after litigating this case through the District Court, the Court of Appeals, and now this Court, Petitioner cannot come up with even one case holding

that the conduct complained of or anything similar violates a right protected under 42 U.S.C. Section 1983.

CONCLUSION

For the foregoing reasons, Respondents request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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